

IN THE SUPREME COURT OF MISSOURI

No. SC94462

G. STEVEN COX,

Appellant,

vs.

KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable James F. Kanatzar, Circuit Judge
Case No. 1116-CV14143

Transferred from the Missouri Court of Appeals, Western District
Appeal No. WD76616

**BRIEF OF THE KANSAS CITY AND ST. LOUIS CHAPTERS OF THE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF APPELLANT**

Paul A. Bullman, #59345
paul@attorneyforworkers.com
4600 Madison Avenue, Suite 810
Kansas City, Missouri 64112
Phone (816) 286-2860
Facsimile (816) 286-2813

Attorney for Amici Curiae Kansas City
and St. Louis Chapters of the
National Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CASES AND AUTHORITIES.....iii

STATEMENT OF CONSENT 1

STATEMENT OF INTEREST 1

STATEMENT OF FACTS 1

POINTS RELIED ON 4

ARGUMENT 6

 I. The Trial Court Committed Reversible Error In Ruling As A Matter Of Law
 That A "Pattern Or Practice Claim" Is A Legal Precondition To The Admission
 Of Evidence Of Defendant's Discriminatory Conduct Toward Other Protected-
 Group Employees, Because The MHRA Never Mentions "Pattern Or Practice,"
 And Such A Legal-Based Holding Directly Conflicts With This Court's "Liberal
 Approach" To Procedural Requirements Under The MHRA, And With
 Established Caselaw..... 6

 II. The Trial Court Committed Reversible Error In Ruling As A Matter Of Law
 On A Pretrial Motion In Limine That As A Legal Precondition To Admission
 Of Evidence Of Defendant's Discriminatory Conduct Toward Other Protected-
 Group Employees, They Must Share The Same Decision-Maker Or Same
 Supervisors, Because Neither Missouri Law Nor Federal Law, Supports Any
 Such Rigid Preconditions For Admissibility..... 17

III. The Trial Court Committed Reversible Error In Excluding As A Matter Of Law General Manager Scott Pioli's Declaration, "I Need To Make Major Changes In This Organization As So Many Employees Of [Carl Peterson] Are Over 40 Years Old," On The Basis Pioli Was A "Non-Decisionmaker" Such That His Statement Was Supposedly A "Stray Remark," Because The Statement Is An Admission That Is Logically And Legally Relevant To Cox's Age Claim, In That It Corroborates Other Evidence That Defendant Planned To "Go In A More Youthful Direction," Thus Making Age A More Likely "Contributing Factor" In Cox's Discharge..... 33

CONCLUSION 44

CERTIFICATE OF COMPLIANCE 45

CERTIFICATE OF SERVICE..... 46

TABLE OF CASES AND AUTHORITIES

Cases

Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128 (1st Cir. 2012) 30, 31

Alhalabi v. Missouri Dept. of Natural Resources,
 300 S.W.3d 518 (Mo. App. E.D. 2009)..... 14

Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997)..... 27

Baker v. Newcomb, 621 S.W.2d 535 (Mo. App. S.D. 1981)..... 22, 23

Bevan v. Honeywell, Inc., 118 F.3d 603 (8th Cir. 1997)..... 31, 34

Bingman v. Natkin & Co., 937 F.2d 553 (10th Cir. 1991) 32

Boyer v. Grandview Manor Care Center, Inc.,
 759 S.W.2d 230 (Mo. App. W.D. 1988) 22

Brockman v. Regency Financial Corp., 124 S.W.3d 43 (Mo. App. W.D. 2004)..... 22

Bynote v. National Super Markets, Inc., 891 S.W.2d 117 (Mo. banc 1995)..... 5, 38, 39

C&E Services, Inc. v. Ashland Inc., 539 F.Supp.2d 316 (D.D.C. 2008)..... 41

Cass Bank & Trust Co. v. Mestman, 888 S.W.2d 400 (Mo. App. E.D. 1994)..... 42

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987)..... 35

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984)..... 11

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. banc 2007) 11, 13, 21

Demers v. Adams Homes of Northwest Florida, Inc.,
 321 Fed.Appx. 847 (11th Cir. 2009) 31

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006) ... 36

EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998)..... 34, 35, 36

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998)..... 30, 36

Estate of Overbey v. Chad Franklin Nat’l Auto Sales, LLC, et al.,
361 S.W.3d 364 (Mo. banc 2012) 20, 24

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988)..... 24, 44

Farrow v. St. Francis Medical Center, 407 S.W.3d 579 (Mo. banc 2013)..... 4, 13, 14

Fisher v. Pharmacia & Upjohn, 225 F.3d 916 (8th Cir. 2000)..... 34

General Tel. Co. of the Northwest, Inc., 446 U.S. 318 (1980)..... 4, 8

George v. Leavitt, 407 F.3d 405 (D.C. Cir. 2005)..... 29

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d. 1261 (11th Cir. 2008)..... 31

Goold v. Hilton Worldwide, __ F.Supp.2d __, 2014 WL 4629083 (E.D.Ca. 9/15/14) 41

Greene v. Safeway Stores, Inc., 210 F.3d. 1237 (10th Cir. 2000)..... 31, 32

Griffin v. Finkbiner, 689 F.3d 584 (6th Cir. 2012)..... 30, 37

Hana Financial, Inc. v. Hana Bank, --- S.Ct. ----, 2015 WL 248559 (2015) 42

Hanna v. Darr, 154 S.W.3d 2 (Mo. App. E.D. 2004)..... 42

Hurst v. Kansas City Mo. Sch. Dist., 437 S.W.3d 327 (Mo. App. W.D. 2014) ... 16, 17, 19

International Broth. Of Teamsters v. U.S., 431 U.S. 324 (1977) 4, 10, 12

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014) 21, 22, 35

Jackson v. Mills, 142 S.W.3d 237 (Mo. App. W.D. 2004) 21

K.C. Roofing Center v. On Top Roofing, Inc.,
807 S.W.2d 545 (Mo. App. W.D. 1991) 22, 23

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622 (Mo. banc 1995) 11

Kline v. City of Kansas City, 334 S.W.3d 632 (Mo. App. W.D. 2011) 21

Lewellen v. Franklin, et al., 441 S.W.3d 136 (Mo. banc 2014) 5, 20, 23, 24

MacDissi v. Valmont Industries, Inc., 856 F.2d 1054 (8th Cir. 1988) 31

Madison v. IBP, Inc., 257 F.3d 780 (8th Cir. 2001)..... 25, 26

McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) 36

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 15, 16

Morgan v. Arkansas Gazette, 897 F.2d 945 (8th Cir. 1990) 32

Morse v. Southern Union Co., 174 F.3d 917 (8th Cir. 1999)..... 41

Newton v. Ford Motor Co., 282 S.W.3d 825 (Mo. banc 2009) 20, 25, 43

Oldaker v. Peters, 817 S.W.2d 245 (Mo. banc 1991) 21

Parrish v. Immanuel Medical Center, 92 F.3d 727 (8th Cir. 1996)..... 31

Peterson v. Progressive Contractors, Inc., 399 S.W.3d 850 (Mo. App. W.D. 2013) .. 5, 39

Plengemeier v. Thermadyne Indus., 409 S.W.3d 395 (Mo. App. E.D. 2013) 10

Powell v. St. Louis & S.F.R., 129 S.W. 963 (Mo. banc 1910) 20

Railroad Co. v. Stout, 17 Wall. 657, 21 L.Ed. 745 (1873)..... 42, 43

Ridout v. JBS USA, LLC, 716 F.3d 1079 (8th Cir. 2013)..... 31

Rinehart v. Shelter General Ins. Co., 261 S.W.3d 583 (Mo. App. W.D. 2008) 5, 10, 22

Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987) 25

Robinson v. Runyon, 149 F.3d 507 (6th Cir. 1998)..... 30, 41, 43

Ryther v. KARE 11, 108 F.3d 832 (8th Cir. en banc 1997) 31, 37

Sprint/United Mgmt. Co. v. Mendelsohn,

552 U.S. 379 (2008) 5, 15, 16, 17, 18, 19, 30, 37

State v. Davis, 318 S.W.3d 618 (Mo. banc 2010) 40

State v. Kennedy, 107 S.W.3d 306 (Mo. App. W.D. 2003) 41, 42

State v. Taylor, 298 S.W.3d 482 (Mo. banc 2009)..... 5, 7, 20, 33, 40

State ex rel. Dean v. Cunningham, 182 S.W.3d 561 (Mo. banc 2006) 13

State ex rel. Diehl v. O’Malley, 95 S.W.3d 82 (Mo. banc 2003) 13

St. Louis County v. River Bend Estates Homeowner’s Ass’n,
 408 S.W.3d 116 (Mo. banc 2013) 30

Templemire v. W&M Welding, Inc., 433 S.W.3d 371 (Mo. banc 2014) 4, 11, 13

Thiessen v. Gen’l Electric Capital Corp., 267 F.3d 1095 (10th Cir. 2001) 11, 12

U.S. v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975)..... 8

U.S. v. Masonry Contractors Ass’n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974)..... 7

Williams v. Trans States Airlines, Inc.,
 281 S.W.3d 854 (Mo. App. W.D. 2009) 5, 21, 26, 27, 28, 29

Yates v. Rexton, Inc., 267 F.3d 793 (8th Cir. 2001) 34, 35

Rules

Fed. R. Evid. 401 19

Fed. R. Evid. 403 19

Rule 74.04..... 42

Statutes

42 U.S.C. § 2000e–6..... 4, 7, 8, 10, 11, 36

Mo. Rev. Stat. § 213.010..... 4, 6, 7

STATEMENT OF CONSENT

Appellant G. Steven Cox ("Cox") and Respondent Kansas City Chiefs Football Club, Inc. ("Chiefs") have consented to the filing of this brief.

STATEMENT OF INTEREST

Amici Curiae, the Kansas City and St. Louis Chapters of the National Employment Lawyers Association (NELA), are voluntary membership organizations of more than 150 lawyers who represent employees in labor, employment, and civil rights disputes throughout Missouri. Both Chapters are affiliates of the National Employment Lawyers Association, which consists of more than 3,000 attorneys (including 67 affiliates), all of whom specialize in representing individuals in workplace controversies. NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment law to ensure that such law is fully enforced and that the rights of workers are fully protected. Kansas City and St. Louis NELA members regularly represent victims asserting discrimination under the Missouri Human Rights Act.

STATEMENT OF FACTS

Steven Cox filed a single-plaintiff claim against Respondent Kansas City Chiefs Football Club, Inc. He asserts that his age was a contributing factor in his termination, thus violating the Missouri Human Rights Act ("MHRA").

During trial, the jury learned that Chief's owner, Clark Hunt, "wanted to go in a more youthful direction." (Tr. 1393-1396).¹ But before trial, the trial court issued a pretrial *in Limine* Order prohibiting Cox from calling numerous protected-group former employees who could verify that the Chiefs discharged (in the same timeframe as Cox) numerous key, front-office employees — all of whom were older than 40 (just like Cox), and all of whom were replaced by younger employees (just like Cox). Just like Cox, most firings were at the direction of President and COO Mark Donovan. Donovan worked jointly with new GM Scott Pioli to restructure the Chiefs' organization pursuant to Clark Hunt's "more youthful" directive. Before any testimony, fired protected-group employees were forbidden from testifying about: (1) their ages, (2) that they were fired at or around the same time as Cox, (3) the circumstances of their own or other employees' terminations, and (4) the fact that two of them had pending MHRA age discrimination lawsuits against the Chiefs under this same "more youthful" directive.

The jury also heard that GM Scott Pioli was "working at the same time toward a common goal" with Mark Donovan to help "restructure" the Chiefs. (Tr. 910). Witness Herman Suhr swore in his deposition that he heard Pioli say: "I need to make major changes in this organization as so many employees of CP [meaning former President and General Manager Carl Petersen] are over 40-years-old." (LF 1011-1109).

¹ Amicus defers to Appellant Cox's more complete recitation of facts.

On February 8, 2013 (Friday before trial), the court fully granted the Motion *in Limine* as to other fired employees and Pioli's statement, without explanation. (LF 1587-1588). On February 11 (first day of trial), the court said it excluded Pioli's statement based on his view that Pioli "was not a decision maker in the termination of Mr. Cox." So Pioli's statement, "would fall into a category of a stray remark." (TR. 280-284).

Just before opening statements in this trial about the intent of management to discriminate based on age, the trial court further ordered that no witnesses should be asked about their age during direct or cross examination. (Tr. 287):

"[G]iven the rulings that I've made and everything else surrounding this case, **we'll just stay away from their age.**" (Bold added).

Later during trial, after offers of proof were proffered from excluded witnesses, the trial court stated the basis for the exclusions: "so the record is clear", other protected-group witnesses were excluded because (1) they did not share the same decision maker as plaintiff Cox; and (2) because "plaintiff did not plead a pattern or practice." (Tr. 1426). The jury returned a defense verdict, the court entered judgment, and Cox timely appealed.

On appeal, the Court of Appeals for the Western District affirmed the evidentiary exclusions, accepting the trial court's law-based reasoning that plaintiff did not plead "a pattern or practice claim"; that the other protected-group employees did not share the same supervisory chain of command/decision makers; and that Pioli was not a decision maker as to Cox, so Suhr's testimony regarding Pioli's statement was "beyond the discrete claim of discriminatory termination alleged in Cox's Petition," and was a "stray remark." Appellant filed an Application for Transfer to this Court, which this Court granted.

POINTS RELIED ON

I.

The Trial Court Committed Reversible Error In Ruling As A Matter Of Law That A "Pattern Or Practice Claim" Is A Legal Precondition To The Admission Of Evidence Of Defendant's Discriminatory Conduct Toward Other Protected-Group Employees, Because The MHRA Never Mentions "Pattern Or Practice," And Such A Legal-Based Holding Directly Conflicts With This Court's "Liberal Approach" To Procedural Requirements Under The MHRA, And With Established Caselaw.

Farrow v. St. Francis Medical Center, 407 S.W.3d 579 (Mo. banc 2013)

Templemire v. W&M Welding, Inc., 433 S.W.3d 371 (Mo. banc 2014)

International Broth. of Teamsters v. U.S., 431 U.S. 324 (1977)

General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980)

Mo. Rev. Stat. §§ 213.010, et seq.

Title VII of the Civil Rights Act of 1964, as amended, Sections 706 and 707

42 U.S.C. § 2000e-6

II.

The Trial Court Committed Reversible Error In Ruling As A Matter Of Law On A Pretrial Motion In Limine That As A Legal Precondition To Admission Of Evidence Of Defendant's Discriminatory Conduct Toward Other Protected-Group Employees, They Must Share The Same Decision-Maker Or Same Supervisors, Because Neither Missouri Law Nor Federal Law, Supports Any Such Rigid Preconditions For Admissibility.

Lewellen v. Franklin, et al., 441 S.W.3d 136 (Mo. banc 2014)

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854 (Mo. App. W.D. 2009)

Rinehart v. Shelter General Ins. Co., 261 S.W.3d 583 (Mo. App. W.D. 2008)

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008)

III.

The Trial Court Committed Reversible Error In Excluding As A Matter Of Law General Manager Scott Pioli's Declaration, "I Need To Make Major Changes In This Organization As So Many Employees Of [Carl Peterson] Are Over 40 Years Old," On The Basis Pioli Was A "Non-Decisionmaker" Such That His Statement Was Supposedly A "Stray Remark," Because The Statement Is An Admission That Is Logically And Legally Relevant To Cox's Age Claim, In That It Corroborates Other Evidence That Defendant Planned To "Go In A More Youthful Direction," Thus Making Age A More Likely "Contributing Factor" In Cox's Discharge.

Bynote v. National Super Markets, Inc., 891 S.W.2d 117 (Mo. banc 1995)

Peterson v. Progressive Contractors, Inc., 399 S.W.3d 850 (Mo. App. W.D. 2013)

State v. Taylor, 298 S.W.3d 482 (Mo. banc 2009)

ARGUMENT

I. The Trial Court Committed Reversible Error In Ruling As A Matter Of Law That A "Pattern Or Practice Claim" Is A Legal Precondition To The Admission Of Evidence Of Defendant's Discriminatory Conduct Toward Other Protected-Group Employees, Because The MHRA Never Mentions "Pattern Or Practice," And Such A Legal-Based Holding Directly Conflicts With This Court's "Liberal Approach" To Procedural Requirements Under The MHRA, And With Established Caselaw.

Never before has a Missouri plaintiff been required to join with other plaintiffs to "claim" a "pattern or practice" in either the administrative charge or the Petition, as a condition precedent to introducing evidence of discrimination against other protected-group employees suggestive of the same illegal bias asserted by the individual plaintiff. The MHRA **nowhere mentions** the words "pattern or practice." Mo. Rev. Stat. §§ 213.010, et seq. Never has any Missouri State Court required any such "claim" — nor should they, because every day, throughout the State of Missouri, non-lawyer citizens file administrative charges with the MCHR. Neither MCHR staff, nor these hundreds of aggrieved lay persons have any notion that they must bring "claims" of a pattern or practice for the benefit of other employees or be forever barred from introducing evidence of defendant's similar intent and mistreatment of others in their protected group. Yet, the trial court in *Cox* wrongly imposed the heretofore nonexistent legal precondition that the plaintiff must have pleaded a "pattern and practice" claim before being allowed to offer undeniably relevant evidence of discrimination.

The Standard of Review Is *De Novo*

A pattern or practice "claim" does not exist under the MHRA. See Mo. Rev. Stat. §§ 213.010, et seq. The trial court thus excluded evidence "through the application of incorrect legal principles." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009) ("[W]hen the issue is primarily legal, no deference is warranted," and this Court "engage[s] in *de novo* review.") (Italics added).

A. "Pattern or Practice" Claims Are Creations of Federal Law

When Title VII was enacted in 1964, Congress authorized the U.S. Department of Justice to bring lawsuits that allege a "pattern or practice" of discrimination under § 707(a):

a. Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the *pattern or practice* is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint....

42 U.S.C. § 2000e-6(a). (Italics added). The Attorney General could litigate under § 707 without filing a charge or attempting pre-suit conciliation. See *U.S. v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 875-76 (6th Cir. 1974) ("The only prerequisite for the Attorney General to bring a civil suit under § 2000e-6 is that he have

reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination.")

In 1972, Congress amended § 707 of Title VII, 42 U.S.C. § 2000e-6, transferring authority from the Attorney General to the EEOC. Congress "intended the EEOC to proceed in the same manner [as did the Attorney General]." *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 329 (1980). The EEOC, like the Attorney General, was empowered to bring a lawsuit without a charge and pre-suit conciliation. "It was unquestionably the design of Congress...to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." *U.S. v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843 (5th Cir. 1975).

Wholly unlike the MHRA, which has absolutely no language relating to a "charge" alleging "pattern or practice of discrimination," § 707(e) expressly so provides, and thus allows the EEOC to investigate and act on such "charges":

e. **Investigation and Action By Commission Pursuant to Filing of Charge of Discrimination; Procedure**

Subsequent to March 24, 1972, the Commission shall have the authority to investigate and act *on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.* All such actions should be conducted within accordance with the procedures set forth in § 2000e-5[706].

42 U.S.C. § 2000e-6(e). (Emphasis added).

Citing no legal authority, the Chiefs planted the seed of error with the trial judge, insisting there was some legal requirement that plaintiff "plead" a pattern or practice "claim," before he could offer relevant evidence of acts of discrimination toward members of the same protected class, stating in its Motion *in Limine* (LF 1110-1114):

"Plaintiff did not allege a pattern and practice of discrimination, nor hostile environment in either his Charge of Discrimination with the Missouri Human Rights Commission or his Petition. In his Charge, Plaintiff noted **one** instance of discrimination — the date of **his** termination. (Bold face in original).

No Missouri authority has ever imposed any such unique pleading requirement — neither under the MHRA statutory and regulatory framework, nor in caselaw. Yet, the trial court never wavered from its erroneous rejection of relevant evidence — always citing plaintiff's failure to satisfy that nonexistent requirement. After the offer of proof concerning Ann Roach, the court reiterated: "So the record is clear, the ruling is based upon the fact that...**plaintiff did not plead a pattern and practice**, did not plead hostile work environment...." (Tr. 1426). At p. 1427, the court repeats: "**The primary thing was that you didn't plead pattern and practice**" such that "these employees were not similarly situated." (Bold added).

No Missouri court in a case under the MHRA has ever mentioned a pattern and practice "claim,"² let alone required that such be pleaded as a precondition to the receipt of otherwise relevant evidence.

Under federal law, the government — and individuals — can bring class-action-styled "pattern or practice cases," following a federal procedural model named after *International Broth. of Teamsters v. U.S.*, 431 U.S. 324 (1977). Cox has **never** tried to allege a unique federal class-action-style "pattern or practice" claim.

This Court should clarify that there is no "pattern-or-practice claim" precondition for receiving circumstantial evidence under the MHRA because "pattern or practice" is nowhere in the Missouri Human Rights Act or its regulations and this is wholly inconsistent with Missouri evidentiary law. In this regard, Title VII is *inconsistent*

² A computer search of Missouri law on "pattern or practice" returns only a single case under the MHRA that even contains that phrase: *Plengemeier v. Thermadyne Indus., Inc.*, 409 S.W.3d 395, 403 (Mo. App. E.D. 2013). In *Plengemeier*, the phrase refers to conduct directed entirely toward the plaintiff — establishing the existence of a continuing violation that made plaintiff's claims timely. The search also returns *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 591 (Mo. App. W.D. 2008), a non-MHRA case that **approves** the admission of evidence of defendant's treatment of others to prove "**a pattern or practice of misconduct.**" (Bold added).

because Title VII has the unique (and separate) statutory pattern-or-practice claim – but even that unique statutory scheme does not affect evidence in a single-plaintiff Title VII case (like *Cox*, if *Cox* was under Title VII instead of MHRA). "The operation of the statute must be confined to 'matters affirmatively pointed out by its terms, and to cases which fall squarely within its letter.'" *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014). The MHRA is a creature of Missouri statute. Accordingly, "[i]n deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is *consistent* with Missouri law [...]" and caselaw "should more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 [Now MAI 38.01] and rely less on analysis developed through federal caselaw." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). (Italics added). "Where the language of the statute is unambiguous, courts must give effect to the language used by the legislature. Courts lack authority 'to read into a statute a legislative intent contrary to the intent made evident by the plain language. There is no room for construction even when the court may prefer a policy different from that enunciated by the legislature.'" *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995). (Internal citation omitted).

Under Title VII, Teamsters-style pattern and practice cases can be brought as private class actions. See *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Also, a group of plaintiffs can pursue a "collective action" under the Age Discrimination in Employment Act (ADEA). See *Thiessen v. Gen'l Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001). Under federal statutes and caselaw, multiple

plaintiffs who intend to pursue a true Teamster's-style "pattern or practice" action must make such a "claim" in order to do so. In *Thiessen*, multiple plaintiffs were "asserting a pattern-or-practice claim modeled on *International Brotherhood of Teamsters v. United States*..." 267 F.3d 1095 at 1105-1108 (10th Cir. 2001). This instructive quote from *Thiessen* illustrates precisely how Cox's case was not a pattern or practice case (*Id.* at 1106):

"Pattern-or-practice cases are typically tried in two or more stages. During the first stage of trial, the plaintiffs' burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers....Thus at the initial liability stage of a pattern-or-practice suit, the [plaintiffs are] not required to offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policies. Instead, plaintiffs' burden is to establish that such a policy existed." (Internal citations and quotations omitted).

There are thus two separate trials in a true federal pattern or practice lawsuit. The "First Stage" where a class of plaintiffs (or the government) prove the existence of a pattern or practice, meaning plaintiffs must demonstrate "that unlawful discrimination has been a regular procedure or policy followed by an employer." *Teamsters*, 431 U.S. at 360. In this first phase of the two-stage trial, plaintiffs typically rely on statistical evidence, plus anecdotal evidence of discrimination. *Id.* See *Thiessen*, 267 F.3d at 1106-1108. Then the "Second Stage," if the plaintiffs succeed in proving a system-wide or

corporate-wide "pattern or practice" of discrimination, then the individual plaintiffs are allowed to prove their own individual harms — but are aided by a presumption of discrimination. That presumption **shifts the burden of proof to the defendant**, to prove that the already-proven discriminatory practice did not cause damage to the individual plaintiff. *Id.*

B. The Trial Court's Pattern-Or-Practice Precondition Violates Missouri's Liberal Approach to MHRA Procedural Requirements

The MHRA contains nothing remotely similar to the federal statutory provision that authorizes "pattern or practice" litigation. This Court should reject the trial court's erroneous exclusion of evidence premised on nonexistent law. *Templemire v. W&M Welding, Inc., Daugherty v. City of Maryland Heights, supra.*

In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), this Court held that Missouri citizens enjoy the *inviolable* constitutional right to a jury trial under the MHRA. Protecting the *inviolable* right to jury trial certainly includes protecting the jury's right to base its decision on all relevant and admissible evidence, and to decide the weight to be given such evidence. This Court repeatedly has recognized that the MHRA "protects important societal interests in prohibiting discrimination in employment...." *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 565 (Mo. banc 2006).

In *Farrow v. St. Francis Medical Center*, 407 S.W.3d 579 (Mo. banc 2013), this Court unanimously reaffirmed that the MHRA requires a simple notice of all claims of discrimination — meaning for this case that Cox's single allegation that age contributed to his discharge is perfectly complete.

"[T]he only requirements imposed by section 213.111 to file a claim under the MHRA are that: (1) an employee file a charge with the Commission prior to filing a state court action [Done here]; (2) the Commission issue a right to sue letter [Done here]; (3) the state court action be filed within ninety days... but no later than two years after the alleged cause of action occurred. [Done here]." Id. at 591.

Moreover, "[a]dministrative complaints are interpreted liberally in an effort to further the remedial purposes of legislation that prohibits unlawful employment practices." *Farrow*, 407 S.W.3d at 594 (citing *Alhalabi v. Mo. Dept. of Natural Resources*, 300 S.W.3d 518, 525 (Mo. App. E.D. 2009)). "Further, the scope of the civil suit may be as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the Charge of Discrimination." Id.

Thus, Steve Cox's single "charged" claim — that age "contributed to" his unlawful discharge, reasonably could lead to an administrative investigation asking this obvious question: If management's intent was to fire Cox because of his age, how did the Kansas City Chiefs treat other older workers around the same timeframe as Steve Cox's firing? The jury was erroneously prevented from knowing that numerous other such employees were fired or forced to resign, and then replaced with younger workers. Why? "The primary thing was that you didn't plead pattern and practice." (Tr. 1427). This erroneous ruling must be reversed.

C. **The U.S. Supreme Court Allows Anecdotal Evidence of Other Protected-Group Employees In Individual, Non-Class Lawsuits**

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is perhaps the most oft-cited case in federal discrimination jurisprudence. Plaintiff Green brought an **individual** failure to rehire claim. The Supreme Court frames the question for decision as "the order and allocation of proof in a **private, non-class action** challenging employment discrimination." *Id.* at 800. (Bold added). Since 1973, in private, non-class action settings this has been the rule:

"Other evidence that may be relevant to any showing of pretext includes ... [the employer]'s general policy and practice with respect to minority [protected-group] employment."

411 U.S. at 804-05. Since 1973, such "general policy and practice" evidence — although not so compelling as to shift the burden of proof to the defendant as in a *Teamster's* case — is still "relevant" and "competent" evidence. 411 U.S. at 804-05.

Recently, *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008), makes clear that anecdotal evidence from other protected-group employees does not require a pattern or practice "claim" as a precondition to admissibility. The Supreme Court held in an **individual** age discrimination case at 388:

"The question whether evidence of discrimination by other supervisors is *relevant in an individual ADEA case* is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."

In fact, *Mendelsohn* itself debunks two of the erroneous legal preconditions that the trial court articulated for the exclusions below: (1) There is no pattern or practice claim requirement; and as shown below, (2) there is no requirement that the other employees share the same supervisor or same supervisory chain of command.

Mendelsohn holds that testimony by "nonparties alleging **discrimination at the hands of supervisors of the defendant company who played no role in the adverse employment decision challenged by plaintiff,**" is "neither *per se* admissible nor *per se* inadmissible." Id. at 380-81, 387-388. (Bold added).

A case decided under the MHRA, *Hurst v. Kansas City Mo. Sch. Dist.*, 437 S.W.3d 327, 342-43 (Mo. App. W.D. 2014), favorably cites *Mendelsohn*, while approving admissibility of "other acts" evidence from a non-plaintiff, former employee who did not share the same supervisor as plaintiff Hurst (Id. at 343): "[T]here is no blanket exclusion in discrimination cases of evidence regarding other complaints of discrimination made against the defendant." *McDonnell Douglas* was a single plaintiff case; *Mendelsohn* was a single plaintiff case; *Hurst* was a single-plaintiff case. All cases cited below under Points II and III are single-plaintiff cases. Nowhere do any of them mention the need for the magic words "pattern or practice" as a precondition for the admission of relevant evidence.

II. The Trial Court Committed Reversible Error In Ruling As A Matter Of Law On A Pretrial Motion In Limine That As A Legal Precondition To Admission Of Evidence Of Defendant's Discriminatory Conduct Toward Other Protected-Group Employees, They Must Share The Same Decision-Maker Or Same Supervisors, Because Neither Missouri Law Nor Federal Law, Supports Any Such Rigid Preconditions For Admissibility.

Generically excluding a collection of potential witnesses before trial, just because their treatment *might* have happened under other supervisors, or originated in departments different than plaintiff's, constitutes a forbidden "blanket" exclusion. *Hurst v. Kansas City, Mo. School District*, supra, correctly applies the persuasive rule in *Mendelsohn*, that "whether evidence of discrimination by **other supervisors** is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." 552 U.S. at 388. (Bold added).

Before one word of testimony, the Chiefs tossed a blanket over this wholesale grouping of terminated protected-age-group employees. The Chiefs wrongly argued their testimony was inherently "irrelevant" — never challenging the content of their testimony:

"[T]he former employees plaintiff intends to use as 'me, too'³ witnesses have vastly

³ NELA respectfully suggests that this Court eschew defendant's inaccurate and pejorative shorthand — "me, too" evidence. This important subject is broader than

different jobs, different supervisors, and different reasons for separation which happened during different time periods and under various different circumstances."

(LF 1110-1114). Importantly, nearly all of the excluded witnesses were fired under Mark Donovan's direction — the "same supervisor" who fired Cox. But the trial court's blanket exclusions were wrong whether the fired employees shared the "same" or "different" supervisors. The United States Supreme Court, in *Mendelsohn*, rejected these very same supposed "differences" that defendant Sprint (and the Chiefs) insisted required categorical exclusion:

"None of five witnesses worked in the Business Development Strategy Group with Mendelsohn, **nor had any of them worked under the supervisors in her chain of command**, which included James Fee...Paul Reddick, Fee's Direct Manager and the decision-maker in Mendelsohn's termination.... **Neither did any of the proffered witnesses report hearing discriminatory remarks by** Fee, Reddick or Blessing."

witnesses merely echoing Steve Cox in a childish "me, too" chant. To the extent lawyers and judges covet shorthand, however, a more even-handed phrase used in caselaw is "other acts evidence," or as used in *Mendelsohn*, "other-supervisor" evidence.

Id. at 382. (Bold added). Nevertheless, the Supreme Court held that "testimony by nonparties alleging discrimination at the hands of supervisors of the defendant company who played no role in the adverse employment decision challenged by the plaintiff" was "neither *per se* admissible nor *per se* inadmissible." Id. at 380.

The Standard of Review is *De Novo*

As NELA understands it, the Chiefs never made any properly individualized, testimony-specific objection as to **any** witness. The Chiefs' blanket objection — covering all of the proffered witnesses for the same reason no matter what each had to say — was that they were not "similarly situated," simply because they worked in "different" departments, under "different" supervisors, and were fired at "different" times. That is a forbidden *per se*/blanket exclusion. *Hurst*, already holds that such blanket exclusions are improper as a matter of law. 437 S.W.3d at 342-43. That emanates from this persuasive law of *Mendelsohn*:

"We note that, had the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules."

Mendelsohn, 552 U.S. at 387.⁴

⁴ The Supreme Court uses "*per se* rule" to mean "blanket rule." Id.

This Court held in *State v. Taylor*, supra, 298 S.W.3d at 492: "[A] trial court can abuse its discretion through the inaccurate resolution of factual issues or through the application of incorrect legal principles." Minimizing or ignoring Mark Donovan's connection among Cox and excluded witnesses constitutes "abuse of discretion" via both "inaccurate resolution of factual issues" and "application of incorrect legal principles."

A. When Intent Is At Issue, Missouri Law Does Not Require Rigid Sameness For Logical Relevance of Defendant's "Other Acts"

For 105 years now, Missouri law has held that "when the question in issue is one involving intent" — as it is in all MHRA actions — "evidence of other acts and conduct of a party of kindred character to the one under investigation...has always been admissible both in criminal as well as civil cases." *Powell v. St. Louis & S.F.R. Co.*, 129 S.W. 963, 971 (Mo. 1910). This Court very recently recognized that a defendant's treatment of others — both before and after what happened to plaintiff — can be crucially relevant evidence to prove both liability for actual damages; and for punitive damages. See *Lewellen v. Franklin, et al.*, 441 S.W.3d 136 (Mo. banc 2014) (Action for fraudulent misrepresentation under Missouri Merchandising Practice Act); also *Estate of Overbey v. Chad Franklin Nat'l Auto Sales, LLC, et al.*, 361 S.W.3d 364 (Mo. banc 2012) (Action for fraudulent misrepresentation under Missouri Merchandising Practice Act); *Newton v. Ford Motor Co.*, 282 S.W.3d 825 (Mo. banc 2009) (Common law product liability action).

The corporate employer's intent is the focus in discrimination cases. This Court's jurisprudence under the MHRA explains precisely why such circumstantial evidence — in

the form of defendant's treatment of others — may be indispensable to help prove employer intent in a single-plaintiff discrimination case like Cox's:

"Direct evidence is not common in discrimination cases because employers are shrewd enough to not leave a trail of direct evidence."

Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 n.4 (Mo. banc 2007).

Cox's was a circumstantial-evidence case like nearly all such cases: "In these cases, circumstantial evidence may be used to prove the facts necessary to sustain a recovery."

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 867 (Mo. App. W.D. 2009).

Missouri applies a flexible "logical relevance" standard — based not on what a judge might find persuasive, but what "a rational finder of fact" might infer as to discriminatory motive and intent. *Kline v. City of Kansas City*, 334 S.W.3d 632, 643 (Mo. App. W.D. 2011).

This Court's simple "test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). Logical relevance "is a very low standard that is easily met." *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo. App. W.D. 2004). Evidence from up to 17 older workers forced out and replaced by younger workers "tends to prove" and "corroborates" whether the Chiefs did (or did not) "go in a more youthful direction."

Missouri evidence law says **nothing** about needing a "pattern or practice" claim, nor anything about other witnesses needing to have the exact same circumstances as plaintiff, or be his clone. Instead, "evidence has probative force if it has *any tendency* to

make a material fact more or less likely." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014).

The wholesale blanket exclusions below run afoul of a long line of Missouri common law cases approving "other acts evidence" in a variety of settings: *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 591 (Mo. App. W.D. 2008) (Insurance bad faith case); *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 51 (Mo. App. W.D. 2004) (Malicious prosecution); *Baker v. Newcomb*, 621 S.W.2d 535, 538 (Mo. App. S.D. 1981) (Landlord-Tenant); *K.C. Roofing Center v. On Top Roofing, Inc.*, 807 S.W.2d 545, 550 (Mo. App. W.D. 1991) (Contract); *Boyer v. Grandview Manor Care Center, Inc.*, 759 S.W.2d 230, 234 (Mo. App. W.D. 1988) (Tortious interference).

The tests are slightly varied, but are consistent in their approach of not allowing restrictive, artificial categorizing or compartmentalizing. Indeed, an oppositely broad flexibility is the rule:

"When such intent is a focus of the inquiry, evidence should be allowed to take a wide range, and a party's actions toward others which tend to demonstrate intent in the present case is relevant. Evidence of conduct not directly related to a claim becomes admissible if the acts are sufficiently connected to show the defendant's disposition, intention, or motive in the acts central to the current claim of damage."

Rinehart, 261 S.W.3d at 591 (Internal quotations and citations omitted); *Brockman*, supra (exact same rule); *Baker*, 621 S.W.2d at 538 ("Evidence of other acts of defendant are admissible if those acts are sufficiently connected with the wrongful acts that they

may tend to show defendant's disposition, intention, or motive in the commission of the acts for which exemplary damages are claimed."); *K.C. Roofing Center*, 807 S.W.2d at 550 (Other acts evidence admissible if it "demonstrates a pattern of activity or scheme or plan which is corroborative of plaintiffs' position, and it is admissible even though subsequent to plaintiffs' dealings with defendants.")

In 2014, this Court unanimously affirmed actual and punitive damages in a single-plaintiff consumer fraud action — citing as supporting evidence plaintiff's testimony concerning "her dealings with National [the defendant]," as **corroborated by** "two other persons who were similarly misled by employees of National or Mr. Franklin's other dealership...[and] 73 complaints against National and Mr. Franklin's other dealership filed with the Missouri Attorney General and numerous similar complaints filed with the Kansas Attorney General." *Lewellen v. Franklin*, supra, 441 S.W.3d at 141.

Further, *Lewellen* affirmed punitive damages based on "repeated" deceitful conduct, as exemplified by those two "similarly misled" other witnesses, plus the same liability evidence "showing that hundreds of complaints from other customers of National or Mr. Franklin's other dealership have been filed with either the Kansas or Missouri attorney general...." *Id.* at 146. Rejecting defendant's argument that the "repeated misconduct" factor is limited only to similar *prior* conduct, this Court held:

"Therefore, this Court finds that **any sufficiently similar misconduct, regardless of when it occurred**, is relevant in assessing the reprehensibility of a defendant's conduct. Mr. Franklin's and National's repetitive use of

intentionally deceptive business practices targeting financially vulnerable persons weighs in favor of a higher punitive damages award."

Id. at 147. (Bold added).

Similarly, in *Estate of Overbey*, supra, this Court held (in 2012), that the jury's finding regarding the owner's knowledge of the fraud "was supported by the testimony of four other persons who claimed they similarly were defrauded by National, as well as evidence that the Missouri Attorney General received at least 35 complaints of analogous conduct...and is seeking a civil injunction." 361 S.W.3d at 372. In words perfectly applicable to Steve Cox's evidence that his firing was part of the corporate employer's broader intent to eliminate older employees throughout the enterprise, this Court observes: "This was not isolated conduct of a single errant salesperson." Id. Similarly, Cox's age as a contributing factor becomes "more likely" when he can show what happened to him at Chiefs' headquarters was not "isolated."

Corroboration is as vital to the trial lawyer trying to prove intentional discrimination as oxygen is for breathing. The corporate employer expectedly tries to constrict plaintiff's proof to the smallest unit possible... ideally to only plaintiff himself. Those crippling restrictions were successfully imposed below— whereas the law recognizes "plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motive." *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (Overruled in-part on other grounds). Here, because the Chiefs were allowed to restrict and isolate the storyline to only Mr. Cox's Stadium Operations unit, the Chiefs' reasons for discharging him are easier to believe in

isolation, because, as Judge Posner once colorfully explained, "It is so easy" for the employer "to concoct a plausible reason for firing a worker who is not superlative." *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987). For that reason the law steps in (Id. at 697-98):

"A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries."

This Court aptly captures the powerful effect of corroboration in *Newton v. Ford Motor Co.*, 282 S.W.3d at 832. There, defendant Ford — like defendant Chiefs below — argued that a series of accidents caused by an alleged product defect were "isolated and random incidents." Id. This Court rejects that notion for reasons perfectly applicable to *Cox*, and all employment cases:

"Ford points out that, although barred from discussing all 11 of the post-upgrade accidents, plaintiffs were able to present evidence regarding the four post-upgrade collisions that occurred before the Newton accident. In the context of the evidence, the logic of this argument is tenuous. **Ford's contention is that each of these accidents is an isolated and random incident. That explanation is plausible when it pertains to only four accidents. Eleven accidents may strain credulity.**"

Id. at 832. (Bold added). See also, *Madison v. IBP, Inc.*, 257 F.3d 780, 793 (8th Cir. 2001), similarly holding, "[W]hat may appear to be a legitimate justification for a single

incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."⁵ (Vacated on other grounds involving damages).

Owner Clark Hunt's plan "to go in a more youthful direction" suggests a plan to fire older workers (like Cox), and hire younger replacements (as happened with Cox). A reasonable juror might wonder, "Did the Chiefs go 'in a more youthful direction' anywhere except Stadium Operations?" Cox apparently had developed extensive evidence "tending to show" the Chiefs did "go in a more youthful direction" throughout its compact, one-location headquarters. The Chiefs' organization is a single, centralized office under Owner (Clark) Hunt, President Donovan and GM Pioli — headquartered on One Arrowhead Drive in Kansas City, Missouri — it is not a far-flung national or international corporation.

Williams v. Trans States Airlines, Inc., supra, strongly supports Cox's theory for admissibility of the "other acts evidence" to help prove employer intent as to Cox.

Williams claimed retaliatory discharge under the MHRA, and the court affirmed admissibility of treatment of another flight attendant — whose incident occurred 3 years before the plaintiffs — crediting the incident as "circumstantial evidence that Williams's [plaintiff's] sexual harassment complaint was a contributing factor in her termination."

281 S.W.3d at 869. There were "differences": Zeb Habib (Ray) complained of sexual

⁵ There is an old saying: "Once might be accidental...Twice might be coincidental...Three times is neither accident nor coincidence — it's intentional enemy action."

harassment by a **different pilot** than the one who harassed plaintiff, and Ray was terminated at a **different** time, 3 years before plaintiff. *Id.* at 864. Just like the Chiefs, defendant Trans State Airlines objected on that identical basis, arguing,

"Ray and Williams were not similarly situated because Ray was not a probationary flight attendant, the two employees had a **different** status with the company, and each was accused of **different** misconduct."

Id. (Bold added). The court properly overruled the objection and admitted the evidence. Plaintiff's theory for "sufficient similarity" to be probative tracks perfectly with Cox's: Williams contended that she and the previous flight attendant (Ray) made complaints of sexual harassment (same protected-group); and both were fired shortly thereafter (same adverse job action).⁶ The *Williams* court held:

"While not dispositive of Williams's claim by itself, we find that evidence of the close proximity in time between the sexual harassment complaints made by two female flight attendants and their subsequent termination by the same male supervisor is relevant evidence which a jury could find supports Williams's claim of retaliatory discharge."

Id. at 869. That quote nails **Cox's reasoning** for admitting "other acts" – though "not dispositive," they provide "relevant evidence which a jury could find" probative.

⁶ This parallels Cox's theory that others in the protected-group were fired and replaced by younger employees.

Significantly, the *Williams* court also used defendant's treatment of Ray as support for submitting and affirming punitive damages (Id. at 871):

"Finally, the circumstances surrounding the termination of another female flight attendant, shortly after she filed a complaint of sexual harassment not only supports Williams's claim for retaliatory discharge, but also supports Williams's claim for punitive damages."

Defendant in *Williams* argued the often confusing (and under Cox's theory inapposite) line of federal cases that have overly-constricted "similarly situated employees" to mean "those who deal with the same supervisor and are subject to the same standards governing performance evaluations and discipline." See, e.g. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997). That reasoning is confined to plaintiffs who claim as their core and exclusive theory of discrimination that they were "discriminatorily disciplined" or "discriminatorily terminated" for work rule violations, whereas "others" who were not in the protected-group — often called "comparators" — violated the same rules but were treated **better**. That is not at all Cox's theory. And *Williams* explicitly addresses and rejects the identical misdirection that was advanced by the Chiefs — that employees are "similarly situated" only when they are "involved in or accused of the same or similar conduct and are disciplined in different ways." 281 S.W.3d at 873.

The *Williams* court's ruling lines up exactly with what Cox unsuccessfully tried to convey to the trial court below (at 873):

"**Under this federal analysis**, Ray and Williams are not 'similarly situated' because they were not involved in the **same conduct** yet disciplined in different ways. **In fact, Williams premises the introduction of the evidence relating to Ray's termination on the assertion that Ray and Williams were involved in the same conduct and disciplined in the exact same way.** (Bold added).

Yes, the last bolded sentence circles back to Cox's and Williams's identical theories that are distinct from "this federal analysis": Cox and Williams stressed the "same" treatment" of the "same" protected-group employees. Finally, speaking in words exactly applicable here the court concluded:

"As such, we do not see the relevance of TSAI's argument that Ray and Williams were not 'similarly situated' as it relates to the admission of evidence regarding Ray's termination."

Id. at 873.⁷

The exact same analysis applies to Cox: All of the older employees are "sufficiently similar" to Cox in the ways that matter for his particular claim that age "contributed to" his termination. Like Cox, all were older, well performing employees.

⁷ Amicus submits the law already supports this rule: "Whether two employees are similarly situated ordinarily presents a question of fact." *George v. Leavitt*, 407 F.3d 405, 414-15 (D.C. Cir. 2005). (Internal quotation and citations omitted).

Like Cox, all were fired and replaced by younger employees. Like Cox, the firings/replacements happened under a totality of suspicious interrelated evidence highly suggestive of pretext flowing from the owner's plan to go in a more youthful direction. Exclusion defies the "logic" of the circumstances." *St. Louis County v. River Bend Estates Homeowner's Ass'n*, 408 S.W.3d 116, 123 (Mo. banc 2013). This is akin to up to 17 fired African-Americans who would be "sufficiently similar" to a fired African-American plaintiff that they should be heard by the jury if an owner "wanted to go in a more Caucasian direction;" just like 17 fired females would be "sufficiently similar" to the fired female plaintiff that they should be heard if an owner "wanted to go in a more male direction." It defies the "logic of the circumstances" to exclude all members of the same protected-group on the erroneous basis used by the court below.

B. Federal Law Supports Admissibility of the Excluded Evidence

Missouri law controls, and on that basis this case should be reversed and remanded for new trial. In addition, federal law that "is consistent with" Missouri law has long supported admissibility of anecdotal evidence from other protected-group employees, in a wide range of single-plaintiff age, sex, and race discrimination cases such as Cox's. See *Griffin v. Finkbiner*, 689 F.3d 584, 595-600 (6th Cir. 2012) (Engaging in a comprehensive, thorough, and persuasive analysis of *Mendelsohn*, while reversing a trial court's exclusion of management's discriminatory statements, and exclusion of differential treatment of numerous other protected-group employees); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 356-57 (6th Cir. 1998) (Same); *Robinson v. Runyon*, 149 F.3d 507, 512-14 (6th Cir. 1998); *Acevedo-Parrilla v. Novartis Ex-Lax*,

Inc., 696 F.3d 128, 145-46 (1st Cir. 2012): "[I]t is relatively straightforward for one to draw statistical significance from the separately adduced fact that... almost all of the *fired* employees — 15 out of a total of 17 people — were over forty years of age." *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d. 1261, 1286-87 (11th Cir. 2008); *Demers v. Adams Homes of Northwest Florida, Inc.*, 321 Fed.Appx. 847, 853-54 (11th Cir. 2009); *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1086 (8th Cir. 2013) ("A demonstrated pattern of preference for younger employees can help prove discriminatory intent.").

Ryther v. KARE 11, 108 F.3d 832, 843-44 (8th Cir. en banc 1997) is a scholarly opinion discussing the wide spectrum of admissible evidence of intent properly received in a fully-tried ADEA case. Evidence of "a corporate atmosphere unfavorable toward older employees," is relevant, including testimony from other employees as to their treatment by the station, "although the situations of the older employees and Ryther differ in some respects, ...there were enough similarities to render the evidence relevant and admissible." *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 611-12 (8th Cir. 1997), affirms an age discrimination verdict while approving a wide variety of evidence similar to what was excluded in the court below. *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988), is a fully tried age case endorsing evidence of terminations of other older employees, noting that although "not conclusive evidence of age discrimination in itself," such evidence is "surely the kind of fact which would cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome." *Parrish v. Immanuel Medical Center*, 92 F.3d 727, 733 (8th Cir. 1996) (Testimony by another employee that she has been told "to retire" was not dispositive,

but "provides valuable circumstantial proof of an atmosphere of age bias and an employer's unlawful intent."); *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237 (10th Cir. 2000), affirms plaintiff's large ADEA verdict — supported by testimony and documents on-point with Cox's evidence: "[s]howing that eight other executives left Safeway in the months leading up to and following Greene's termination. All eight men were in their fifties or sixties. Younger people succeeded all eight men." *Id.* at 1241. *Bingman v. Natkin & Co.*, 937 F.2d 553, 556-57 (10th Cir. 1991) likewise allowed "evidence of defendant's practice in terminating older employees," even though they had "other supervisors." The eloquently simple explanation for why this is "entirely relevant" evidence is consistent with Missouri law (*Id.*):

"[E]vidence concerning the make-up of the employment force and events which occurred after plaintiff's termination were entirely relevant to the question of whether or not age was one of the determinative reasons for plaintiff's termination; and ...evidence not too remote in time that defendant terminated others in the 60-year-old age group would be entirely relevant to the question of defendant's policies and practices."

Finally, *Morgan v. Arkansas Gazette*, 897 F.2d 945, 950-51 (8th Cir. 1990) supports admitting testimony by other terminated employees, in a case where "[a] pattern of employees over the age of 40 leaving the circulation department and being replaced by younger employees developed."

Incidentally, all cited federal cases are non-class, individual-plaintiff actions.

III. The Trial Court Committed Reversible Error In Excluding As A Matter Of Law General Manager Scott Pioli's Declaration, "I Need To Make Major Changes In This Organization As So Many Employees Of [Carl Peterson] Are Over 40 Years Old," On The Basis Pioli Was A "Non-Decisionmaker" Such That His Statement Was Supposedly A "Stray Remark," Because The Statement Is An Admission That Is Logically And Legally Relevant To Cox's Age Claim, In That It Corroborates Other Evidence That Defendant Planned To "Go In A More Youthful Direction," Thus Making Age A More Likely "Contributing Factor" In Cox's Discharge.

As stated, the jury did hear that Chiefs owner, Clark Hunt, "wanted to go in a more youthful direction." (Tr. 1393-1396). And that GM Scott Pioli was under direction to help "restructure" the Chiefs, "working at the same time toward a common goal" with Mark Donovan. (Tr. 910) But on Motion *in Limine*, before any evidence, the trial court entirely excluded the sworn deposition of Herman Suhr, who quoted Pioli as stating, **"I need to make major changes in this organization as so many employees of CP [former President and GM Carl Peterson] are over 40 years old."** (LF 1011-1109). Defendant argued Pioli "was not the decisionmaker," and the statement was hearsay. The trial court held it would exclude the statement because Pioli "was not a decisionmaker in the termination of Mr. Cox," and the statement "would fall into a category of a stray remark." (Tr. 280-284).

The Standard of Review is *De Novo*

"[W]hen the issue is primarily legal, no deference is warranted and appellate courts engage in *de novo* review." *State v. Taylor*, 298 S.W.3d at 492. In *Taylor*, this

Court stated that, "whether a statement is hearsay is given no deference and is reviewed *de novo*." *Id.* n.4. (Italics added). Pioli's statement is an admission and the "stray remarks" legal rationale for exclusion is **nonexistent** in Missouri law. Words matter and "stray remarks" is a confusing, pejorative term, which by its very words "stray remarks" renounces the validity of the evidence before any conscious thought much less legal analysis. NELA urges this Court to **block** the phrase "stray remarks" from gaining even a toehold in the jurisprudence of Missouri.

A. The Proper Analysis Is Whether This Constitutes an Admission

No one disputes that the Chiefs discharged numerous front office employees around the same timeframe as Steve Cox's termination. All of them were older than 40, all of them were replaced by younger employees. Just like Cox, most firings were at Mark Donovan's direction, and all of the fired older employees worked under former President and General Manager Carl Peterson. Lest there be any doubt, Carl Peterson's out-of-court directive from Clark Hunt that he repeated to witness Ann Roach, was not "double hearsay" because "each layer of the out-of-court statement was admissible as a statement of a party opponent." *Bevan v. Honeywell, Inc.*, supra, 118 F.3d at 611; (Affirming the admissibility of a manager's statement quoting another manager, because each layer "was admissible as a statement of a party opponent."); *EEOC v. HBE Corp.*, 135 F.3d 543, 550 (8th Cir. 1998) (Same rule); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 916, 922 n. 4 (8th Cir. 2000) (Age case applying the same rule, while citing *EEOC v. HBE*; and *Bevan*). *Yates v. Rexton, Inc.*, 267 F.3d 793, 802 (8th Cir. 2001) (Holding it was an "abuse of discretion" to exclude layered declarations as hearsay: "Although these

include layers of out-of-court statements, each layer was admissible as a statement of a party opponent.") *EEOC v. HBE* holds:

"The statements were not hearsay because they were made in the course of employment by Adam's Mark managers with authority for management and employment decisions."

HBE, 135 F.3d at 552. The statements at issue in *EEOC v. HBE* were attributed to "the controlling figure in the running of the hotel," who would be the equivalent of Chiefs owner, Clark Hunt. The fact that some of these statements came through multiple managers did not matter "so long as the test for double hearsay is met." The same legal rationale supports admissibility of Ann Roach's testimony.

Pioli's declaration was "logically relevant" because it tends to corroborate the evidence that Owner Hunt wanted to take the organization "in a more youthful direction." *Ivie v. Smith*, supra, 439 S.W.3d at 199. General Manager Pioli's statement tends to prove the Chiefs organization's intent to engage in age discrimination. It is obviously "logically" relevant, in that it can be probative evidence of the corporate culture and attitudes potentially affecting all supervisors, and hence all decisions — including Steve Cox's firing.

Courts have repeatedly held that biased remarks such as Pioli's — even if made by supervisors not directly involved in the named plaintiff's personnel action — still allow jurors to reach inferences as to "the influences behind the actions taken with respect to the individual plaintiff." *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597-98 (1st Cir. 1987). Logical relevance is aptly described in yet another federal case:

"Discriminatory statements may reflect a cumulative managerial attitude among the defendant-employer's managers that has influenced the decision making process for a considerable time."

Ercegovich v. Goodyear Tire & Rubber, supra, 154 F.3d at 356-57. As such, "the comments of the nondecisionmaker are not categorically excludable."⁸

To once again take the court's exclusionary ruling to its logical extreme, in a race discrimination case, would any court be allowed to breezily reject as a "stray remark" the General Manager's statements, "There are too many African-Americans here" or "We need to go in a more Caucasian direction." No, as a matter of fact, the *HBE* case actually provides the answer to that question by admitting evidence that a manager heard another higher manager say to fire one of the plaintiffs, because **"it was getting 'too dark' in Chestnut's (the cafe near the front entrance in the Adam's Mark) since [plaintiff] was 'hiring too many blacks.'"** 135 F.3d at 550. (Bold added).

⁸ "The word 'decisionmaker' appears nowhere in Title VII." *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487 (10th Cir. 2006). Instead, Title VII (like the MHRA) "imposes liability for discrimination by employers and their agents." *Id.* "[Plaintiff] need not show his supervisors were personally prejudiced against him." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1260 (10th Cir. 1988). That the speaker of biased comments was also a decisionmaker is of course pertinent — but it is not compulsory.

Could trial courts get away with excluding as a "stray remark" a General Manager being overheard saying, "I need to make so many personnel changes around here as there are so many females?" Remember that *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008) holds such comments by "other supervisors" are not *per se* excludable (at 381-82):

"Three of the witnesses alleged that they heard one or more Sprint supervisors or manager make remarks denigrating older workers....[None] of the proffered witnesses report hearing discriminatory remarks by [the supervisors in plaintiff Mendelsohn's chain of command]."

Defendant Sprint unsuccessfully labeled these as "stray remarks" — but the Supreme Court rejected that argument.

The previously cited 6th Circuit case which thoroughly reviews *Mendelsohn* while reversing the trial court's restrictive exclusionary rulings, encapsulates the true logical and legal relevancy of Pioli's statement:

"Circumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant's workplace in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff."

Griffin v. Finkbeiner, supra, 689 F.3d at 595; *Ryther v. KARE 11*, supra, 108 F.3d at 842-44 (8th Cir. en banc 1997) (Fully endorsing evidence tending to show "a corporate atmosphere unfavorable toward older employees," as wholly relevant to support plaintiff's individual age claim.)

The **jury** should have decided the weight and value of Pioli's "admission," under this Court's decision in *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117 (Mo. banc 1995). *Bynote* did away with an earlier line of caselaw requiring that an employee must hold some type of "executive position" for a statement to be vicariously admissible against a corporation. But before *Bynote* did away with that prerequisite, this Court unanimously reconfirms an executive's capacity to make vicarious admissions:

"It is true that a person with executive capacity is generally an agent for the entity he or she serves and has broad authority to bind the principal by his or her statements."

891 S.W.2d at 124. That most certainly covers *General Manager Pioli*.

The law from *Bynote* — which was never considered by the trial court although it should have been — states that the better (and much more expansive) rule is (at 124):

"[A]n admission of an agent or employee may be received in evidence against his principal, if relevant to the issues involved, where the agent, in making the admission, was acting within the scope of his authority." (Internal quotations and citations omitted).

Circumstantial evidence such as this Court found sufficient in *Bynote*, most certainly provides sufficient foundation for Pioli's admission:

"[T]he bagger and checker were employees of National at the time of the statements and ...the scope of their duties at that time included the making of those statements: the checker's duty to tell a bagger to clean up a spill if she saw

one, and the bagger's duty to respond to the checker's inquiry of whether or not he had cleaned up the spill."

Id. at 124. The same factors are even more strongly true for GM Pioli, considering his joint responsibility (with Donovan) to execute Owner Hunt's desire to "go in a more youthful direction."

In *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850 (Mo. App. W.D. 2013), the Court of Appeals reviewed *Bynote*, and later cases, and affirmed — under those particular circumstances — the trial court's exclusion of testimony of a conversation with an unnamed job foreman the day following an accident. Nevertheless, the court states a rule of admissibility easily met by Pioli's statement:

"*Bynote* and *Skay* instruct that it is the subject matter of an employee's statement, and not the relationship with the person who overhears the statement, or the circumstances giving rise to the conversation, which must be within the scope of the employee's duty."

Id. at 870. Because Scott Pioli was on a joint mission with Mark Donovan, under the direction of Owner (Clark) Hunt to restructure the entire Chiefs organization by going "in a more youthful direction," the statement overheard by Herman Suhr under the circumstances could be weighed and concluded by the jury to have been within the scope of Pioli's duties.

B. The Statement Was Not Legally Irrelevant As A "Stray Remark"

The trial court suggests that he also excluded the evidence on the basis it was not "legally relevant," but the court premised this rationale on the completely false legal notion that the disputed statement is a "stray remark."

"Therefore, it was my position then and it's my position now that the disputed statement falls into the category of a stray remark and is therefore inadmissible, and also that its prejudicial effect, that being the statement, outweighs any probative value that the statement would have for the jury.... For example, the prejudicial effect of the jury attributing that stray remark to a decisionmaker in this case as to the plaintiff's termination outweighs any probative value the statement brings to the case."

(Tr. 949) First, "stray remark" is a federal concept unknown in Missouri law. Moreover, evidence is not "unfairly prejudicial" just because it might hurt the objecting party's case. *State v. Davis*, 318 S.W.3d 618, 640 (Mo. banc 2010). The evidence here was admissible as an admission. "Prejudice is presumed when admissible evidence is excluded and is rebutted by specific facts and circumstances." *State v. Taylor*, supra, 298 S.W.3d at 492. Age-based comments cannot possibly be "overly prejudicial," in an age discrimination trial. Yes, such evidence is potentially — and **properly** — "prejudicial" to the Chiefs if believed by the jury. But the jury must be allowed to consider it and weigh it — along with **all** the other evidence. In an age discrimination case, the court can't treat evidence touching on age as if it is so toxic that its very mention is highly inflammatory and "unfairly prejudicial."

Just before opening statements, the court announced that witnesses shouldn't even mention their ages, "We'll just stay away from their age." (Tr. 287). Staying away from age in an age discrimination trial defies the logic of the circumstances. For example, using the "N" word in the workplace is wrong and it is strong evidence that one might well call "prejudicial." But this sage observation illustrates it is still admissible because it could tend to prove illegal discriminatory bias: "It is axiomatic that the available evidence provided to establish racial animus may be racially inflammatory." *Robinson v. Runyon*, supra, 149 F.3d at 515. Same here. Numerous federal courts have made the pertinent observation: "When a major company executive speaks," like Pioli, and the executive's comments prove to be disadvantageous to a company's subsequent litigation posture, companies like the Chiefs "[c]annot compartmentalize this executive as if he had nothing more to do with this company policy than the janitor or watchman." See, e.g. *Morse v. Southern Union Co.*, 174 F.3d 917, 922-23 (8th Cir. 1999) (and numerous cases cited therein).

C. A Trial Court Cannot Weigh Evidence On A Motion In Limine

"[A] motion *in limine* should not be used to resolve factual disputes or weigh evidence." *C&E Services, Inc. v. Ashland Inc.*, 539 F.Supp.2d 316, 323 (D.D.C. 2008) (Italics added), "because that is the province of a jury." *Goold v. Hilton Worldwide*, __ F.Supp.2d __, 2014 WL 4629083 (E.D.Ca. 9/15/14), Slip op. at 2. Reasonable minds can disagree on probative value, so **the jury** decides weight and persuasiveness of evidence through the crucible of adversary trial. *State v. Kennedy*, 107 S.W.3d 306, 311 (Mo.

App. W.D. 2003) (to the extent a party challenges evidence as "too remote" to be probative, that "affects weight" and not admissibility.)

As stated by the Court of Appeals, a motion *in limine* "should not be employed indiscriminately. [A motion *in limine*] is not a substitute for a summary judgment motion. Nor should [a motion *in limine*] 'ordinarily [be] employed to choke off an entire claim or defense.'" *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 404 (Mo. App. E.D. 1994) (Internal citation omitted). See also, *Hanna v. Darr*, 154 S.W.3d 2 (Mo. App. E.D. 2004) (Reversing a trial court that treated a motion *in limine* as a motion for summary judgment without requiring the party to fully comply with Rule 74.04). After all, if filing a pretrial Motion *in Limine* could shift responsibility for resolving everyday evidentiary disputes to the trial courts, then trial by jury could easily be transformed into "trial by Motion *in Limine*."

Well established limitations on the judge's role in evaluating weight of evidence (or lack thereof) is an essential consequence of the *inviolable* constitutional right to a jury trial. Could Pioli's statement make a disputed fact more or less probable than without this evidence? Of course it could. Defendant is free to challenge — as Chiefs counsel already has done through the cross examination contained in the deposition — the weight and value of Herman Suhr's testimony. As said repeatedly by the United States Supreme Court, "twelve [jurors] know more of the common affairs of life than does one [judge], [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. " *Hana Financial, Inc. v. Hana Bank*, --- S.Ct. ----, 2015 WL 248559*3 (2015) (quoting *Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L.Ed. 745

(1873)). In other words, collectively twelve jurors have more real world workplace experience than one judge. The jurors' perceptions of proffered evidence will vary. This is a natural consequence of our jury system. A judge may be doubtful about the probative force of certain evidence, and yet should admit it because the jury, in its rightful function may perceive it differently than the judge:

"The rules regarding relevancy, however, are quite liberal.... Neither the appellate nor the district court is permitted to consider the weight or sufficiency of the evidence in determining relevancy and ' [e]ven if the district court believes the evidence is insufficient to prove the ultimate point for which it was offered, it may not exclude the evidence if it has even the slightest probative worth.'"

Robinson v. Runyon, supra, 149 F.3d at 512. (Internal citation omitted).

"On review, this Court will consider a trial court error prejudicial if it appears from the record that the error materially affected the merits of the action." ***Newton v. Ford***, supra, 282 S.W.3d at 31. Plaintiff suffered "prejudice" by the exclusion because it reasonably "affected the merits." The totality of evidence suggests Pioli's statement could be highly relevant — and the judge's very exclusion that it was "overly prejudicial" certainly reveals his belief that the jury would attach weight to it. When a plaintiff "relies heavily on circumstantial evidence" (as is true here), "each piece of evidence served to complete part of the puzzle of this case. The absence of even one piece of highly relevant evidence may have made the difference in the juror's minds, and its exclusion was far from harmless." ***Robinson v. Runyon***, supra, 149 F.3d at 515.

CONCLUSION

The evidence plaintiff Cox sought to introduce likely would have caused the scales of evidence to weigh in his favor. The fact the trial court excluded the evidence *in limine* requires this Court to carefully examine (and reverse) the unquestionable prejudice suffered by plaintiff Cox. A succinct observation by the late Judge Richard Arnold in *Estes v. Dick Smith Ford*, summarizes the case at bar: "The jury should have been allowed to consider [Cox's] workforce evidence and sort out the parties' conflicting explanations of its significance." 856 F.2d at 1103.

For the reasons set forth above, the Kansas City and St. Louis Chapters of NELA, as amici curiae, respectfully request that this Court reverse the judgment and remand for a new trial on all issues.

Respectfully submitted,

By: /s/ Paul A. Bullman
 Paul A. Bullman #59345
 paul@attorneyforworkers.com
 4600 Madison Avenue, Suite 810
 Kansas City, Missouri 64112
 Phone (816) 286-2860
 Facsimile (816) 286-2813

Attorney for Amici Curiae Kansas City and St.
 Louis Chapters of the National Employment
 Lawyers Association

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b). According to the word count function of Microsoft Word, the foregoing brief, from the Table of Contents through the Conclusion, contains 12,163 words.

/s/ Paul A. Bullman
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that on February 6, 2015, the foregoing document was served through the electronic filing system upon:

Chad Beaver
Lewis Galloway
1600 Genessee St., Ste. 918
Kansas City, MO 64102

Anthony Romano
Eric Packel
900 W. 48th Pl., Ste. 900
Kansas City, MO 64112

/s/ Paul A. Bullman
Attorney for Amici Curiae